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In The

Supreme Court of the United States

JOHN ASHCROFT,
Attorney General of the United States,

Petitioner,

v.

THE AMERICAN CIVIL LIBERTIES UNION, et al.,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* COUNTY OF DUPAGE, ILLINOIS, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The County of DuPage, Illinois, consists of approximately 332 square miles located approximately 30 miles west of Chicago. DuPage County is the second largest county in Illinois. With nearly one million residents, the County of DuPage has an active school system. There are 241 public schools in DuPage County, comprised of 164 elementary schools, 36 middle schools, 17 junior high schools and 24 high schools. In this school system, the parents, teachers, administrators and school support personnel of DuPage County educate, train, mentor and advise nearly 200,000 children each year. The parents, teachers, school officials and prosecutors of DuPage County, Illinois, have a substantial interest in the issue of whether federal, state and local governments may restrict the time, place and manner that vendors of sexually explicit materials may peddle their products. Thus, the rights of federal, state and local units of government to take reasonable and necessary measures to ensure the health, safety and welfare of society's children is of profound concern to the *Amicus Curiae*.

SUMMARY OF ARGUMENT

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae* made a monetary contribution to the preparation and submission of this brief. Consent has been obtained from all parties pursuant to United States Supreme Court Rules to *Amicus Curiae* filing this brief. The consent letters have been submitted with this brief.

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944). The relief sought by respondents presents a substantial threat to the ability of federal, state and local governments across this nation to take reasonable and necessary measures to protect the health, safety and welfare of its children.

The Child Online Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by means of the Internet that is available to minors and that includes material that is "harmful to minors" unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. §§ 231(a)(1) and (c)(1) (Supp. IV 1998). COPA imposes restrictions only in those limited areas where the commercial speech affects children. Said another way, COPA requires vendors of sexually explicit materials to install guarantees that children may not access web sites containing sexually explicit materials. These regulations do not restrict the peddling of sexually explicit materials in lawful transactions to adults. To the contrary, COPA solely requires vendors of sexually explicit materials to take reasonable steps to ensure that their sexually explicit materials are not improperly disseminated to an audience that the law does not permit these vendors to approach. COPA clearly satisfies this Court's "reasonableness" test as set forth in *Fox*[2], and therefore should be upheld by this Court.

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[2] *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989).

The respondents seek the benefit of unfettered discretion to peddle sexually explicit materials wherever and whenever they please. If successful in their argument, respondents' rights to seek and attain corporate profits from the sales of sexually explicit materials will supercede the rights of parents, teachers, principals, school boards, prosecutors and others acting in *parens patriae*, to create safe harbors where children are safe from the devastating effects of sexually explicit materials.

The respondents further seek to attain First Amendment protections for sexually explicit advertising not previously afforded to any other category of speech, whether political or commercial. This new level of absolute immunity from federal, state or local state regulation sought by respondents is unprecedented.

The *Amicus* respectfully urges this Court to affirm that commercial speech can be restricted where the interests of children are at stake and that the rights of commercial Internet vendors peddling sexually explicit materials is not absolute under the First Amendment of our nation's Constitution.

ARGUMENT

I. THE LEGISLATURE MAY RESTRICT COMMERCIAL SPEECH ON THE INTERNET TO PROTECT THE HEALTH AND SAFETY OF CHILDREN.

A. The Health Of Children Constitutes a "Substantial Interest" Which Clearly Justifies The Legislature's Right To Commercial Speech On The Internet.

This Court has consistently recognized that a government may act more protectively where children are concerned. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). The law is well settled that a legislature can adopt more stringent controls on communicative materials available to children than on those available to adults. *Erznoznik*, 422 U.S. at 212. Children deserve special solitude in the First Amendment balance because they lack the cognitive skills to assess and analyze fully the information presented through commercial advertisements. *See generally, Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir. 1996).

This Court has long been a champion of protecting children's health and welfare in numerous cases where the interests of children were balanced against commercial free speech interests. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court approved extra restrictions on speech on the radio because of the pervasiveness of the medium and the presence of children in the audience. In *Ginsburg v. New York*, 390 U.S. 629 (1968), this Court sustained a law which protected children from non-

obscene literature. And while this Court has acknowledged a right to private possession of mature entertainment materials in private residences, *see generally, Stanley v. Georgia*, 394 U.S. 557, 566 (1969), this Court has allowed stringent legislative responses to "destroy a market for the exploitative use of children." *Osbourne v. Ohio*, 495 U.S. 103, 109 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944). This Court has afforded children this special safeguard to ensure that children do not become lost in the marketplace of ideas. *See generally, Anheuser-Busch*, 101 F.3d at 330.

More recently, this Court reiterated the position it has taken in prior cases permitting the balance of First Amendment rights to be tipped in favor of the health of children. In *Osbourne v. Ohio*, 395 U.S. 103 (1990), this Court stated:

> It is evident beyond the need for elaboration that [the government's] interest in safeguarding the physical and psychological well-being of a minor is compelling. . . .

The potential ramifications of the instant case pose a real threat to the healthy, well-rounded growth of society's children. This threat has been well documented. Mr.

J. Robert Flores, Vice President for the National Law Center for Children and Families, stated to Congress' Committee on Commerce (Subcommittee on Telecommunications, Trade and Consumer Protection) at a hearing on Obscene Material Available on the Internet, that sexually explicit materials pose a real and significant threat to our nation's youth:

> Does this threaten children? You better believe it does. Our kids and grand-kids see it and become indoctrinated by it.

Statement of J. Robert Flores, Esq., Vice President and Senior Counsel, National Law Center for Children and Families before the Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection, Hearing on: Obscene Material Available Via The Internet (May 23, 2000). Mr. Flores elaborated on the increased effort that vendors use to market sexually explicit materials over the Internet:

> The pornography industry has also become among the most aggressive marketers on the Internet, using newly developed "push" technologies . . . [T]hus, even if it were true, and I doubt it, that only those who sought out obscenity could find it, today only a lucky few are able to avoid it, as the Internet user community is bombarded with advertisements, tricked into visiting sites, given hot links to porn when search engines are asked for innocent sites, sent unsolicited porn spam e-mails, and trapped in endless mousetraps that bounce them from porn site to porn site when they try to leave.

Id. Our nation's children are not immune from the situation described by Mr. Flores' in his statement. The Thursday, October 7, 1999 edition of *The Florida Times Union* reported that 91 percent of teenagers responding to a survey responded that they have stumbled across an Internet web site that their parents would find objectionable.[3]

A March 28, 2000 survey commissioned by the National School Boards Association (NSBA) and supported by the Children's Television Workshop and Microsoft, reported one of parents' top concerns about their children using the Internet was the possibility that their children will encounter pornography. According to this survey, 78 percent of children ages 13 to 17 said they use the Internet when they are alone.

There is a real threat to our nation's children posed by the inordinate amount of information, and sexually explicit materials, available to anyone with a computer and a connection to the Internet. The vast majority of children clearly are using the Internet alone, and virtually all of these children have been exposed to objectionable material during their travels down this "information superhighway." Children lack the cognitive skills to assess and analyze fully the information presented through commercial advertisements. *See generally, Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir. 1996).

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[3] This survey, published by the Safe America Foundation and Yankelovich Partners, Inc., surveyed 502 parents and 503 teens on Internet issues in August 1999.

Congress enacted COPA as a response to the need to protect the nation's children from the dangers they may encounter on the Internet. The serious impact of sexually explicit material on our nation's children clearly supported COPA's enactment. The impact that sexually explicit materials has on children in this nation clearly supports a balancing of First Amendment rights by this Court to affirm COPA's validity and enforceability.

B. The First Amendment Is Not Absolute And Thus The Peddling of Sexually Explicit Materials On The Internet Is Not Immune From Regulation.

Since this Court rendered its decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), commercial speech has been afforded some level of protection under the First Amendment from unwarranted governmental interference. Respondents' arguments in essence are an attempt to expand this Court's ruling in the *Virginia Pharmacy Board* case to such a degree that the communication of all sexually explicit materials on the Internet will be virtually immune from any and all regulation. Said another way, respondents' arguments, if successful, will elevate the peddling of sexually explicit materials on the Internet to a degree that it is afforded the same constitutional protections that are traditionally afforded to political speech. The respondents' positions are contrary to the letter and spirit of prior decisions made by this Court and should be flatly rejected.

This Court has long afforded substantial constitutional protection only to true political speech where, unlike the peddling of sexually explicit materials on the Internet, profit is not the central motive. In fact, in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) this Court laid the foundation for the exclusion of sexually explicit materials from the realm of constitutionally protected expression. *See generally, New York v. Ferber*, 458 U.S. 747 (1982). There, this Court clearly established that the act of peddling of sexually explicit materials is not afforded absolute protection under the First Amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky, 315 U.S. at 571-572 (footnotes omitted). Consistent with its decision in *Chaplinsky*, this Court squarely held in *Roth v. United States*, 354 U.S. 476 (1957) that "obcenity is not within the area of constitutionally protected speech. . . . " In *Chaplinsky*, this Court recognized that "rejection of obscenity as utterly without redeeming social importance" was implicit in the history of the First Amendment:

> The original States provided for the prosecution of libel, blasphemy, and profanity, and the universal judgment that obscenity should be

> restrained [is] reflected in the international agreement of over 50 nations, in obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956.

New York v. Ferber, 458 U.S. 754 (footnotes omitted).

There are many examples where this Court has held numerous types of non-commercial speech are afforded First Amendment protections. For example, this Court has long held that the First Amendment shields such acts as saluting the flag as well as refusing to do so. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943). The First Amendment shields an individual's right to wear an armband to protest a war. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-506 (1969). This Court has held that displaying a red flag is also protected under the First Amendment, *Stromberg v. California*, 283 U.S. 359, 369 (1931), as well as "marching, walking or parading" in uniforms displaying the swastika. *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977). The speech in each of these cases sought to advance traditional notions of political thought, protest and societal change.

However, this Court has also ruled that even true political speech is not immune from governmental restriction. This Court has refused to extend unlimited First Amendment protection to all forms of political speech even though this nation treasures political speech as the cornerstone of its democracy. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld the legislative branch's limitations on campaign contributions. This Court reasoned that the potential for corruption and the avoidance of the appearance of improper influence was a sufficiently

important concern to justify legislative limitations on campaign contributions. Similarly, in *Nixon, Attorney General of Missouri, et al. v. Shrink Missouri Government PAC, et al.*, 528 U.S. 377 (2000), this Court again upheld as constitutional state limitations on campaign contributions despite the political nature of the donations. This Court reasoned that the danger of corruption in the electoral system is a sufficient state interest to uphold limitations placed on campaign contributions.

It is important to note that this Court has regularly restricted other forms of speech where profit was not the central motive and where the speaker asserted that their speech was, in a broad sense, an "exchange of ideas." In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), this Court ruled that fighting words fall beyond the scope of the First Amendment. In *Beauharmais v. Illinois*, 343 U.S. 250 (1952), this Court ruled that group libel is not afforded protection under the First Amendment. Similarly, in *FCC, supra*, 438 U.S. at 726, this Court denied constitutional protection to indecent speech. A similar conclusion was reached by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) with regard to defamatory falsehood.

This Court has recognized that commercial speech, like the commercial peddling of sexually explicit materials on the Internet, may be restricted in certain circumstances because commercial speech is not afforded the same, heightened level of protection under the First Amendment traditionally given to political speech. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978). This Court has recognized the "common sense" distinction between speech proposing a commercial

transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ohralik*, 436 U.S. at 455-456.

In this case, the respondents seek a judicial license to peddle sexually explicit materials wherever and whenever they please. If successful in their argument, respondents rights to seek and attain corporate profits from the sale of sexually explicit materials will supercede the rights of parents, teachers, principals, and those acting in *parens patriae* of children to create a safe harbor where children can be safe from the devastating effects of sexually explicit materials.

C. A Legislature's Restrictions On The Peddling Of Sexually Explicit Materials Pass Constitutional Muster If They Have A Reasonable Relation To The Goal Of Protecting Children's Health.

Once a legislature has identified a substantial interest that supercedes the First Amendment protections afforded to commercial speech, the legislature is not required to employ the least restrictive means to promote that substantial interest. *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989). Here, the legislature has established that the health and safety of children are substantial interests that supercede any First Amendment protection that Internet advertisers may have otherwise had in the absence of these substantial interests.

The legislature is not required to seek out and use the least restrictive means available to protect children from

the negative effects of exposure to sexually explicit materials. Respondents have suggested that the legislature is required, or should be required, to apply the least restrictive means test when restricting commercial speech. The *Amicus* acknowledges that this Court, in dicta in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), suggested that the least restrictive means test be applied in commercial speech cases. However, this Court did not adopt the least restrictive means test in its holding in *Central Hudson*. Furthermore, this Court has not adopted the use of the least restrictive means test in any subsequent commercial speech case. To the contrary, this Court has specifically held that the least restrictive means test is not required in all commercial speech cases. *Fox, supra.*

Justice Scalia, writing for the Court in *Fox*, emphasized that commercial speech is afforded lesser protection in the spectrum of First Amendment protections. *Id.* Therefore, Justice Scalia concluded that to apply the least restrictive means test would raise commercial speech to a higher level of First Amendment protection than it has been previously afforded by this Court. *Id.* Jusice Scalia stated:

> In sum, while we have insisted that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful," . . . we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a

> "fit" between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but, as we have put it in other contexts . . . a means narrowly tailored to achieve the desired objective. Within these bounds we leave it to governmental decision-makers to judge what manner of regulation may be best employed.

Id., citing, Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) *and citing In re R.M.J.,* 455 U.S. 191 (1982).

The legislature is not required to use the absolute least restrictive means that guarantees in each and every circumstance that children, and children only, will be insulated from the adverse effects of sexually explicit materials. The legislature is required only to demonstrate that its restrictions on the peddling of sexually explicit materials on the Internet is *reasonably related* to the goal of protecting childrens' health and that its restrictions are narrowly tailored to achieve that purpose.

The regulations at issue here clearly satisfy this Court's test. The Child Online Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by means of the Internet that is available to minors and that includes material that is "harmful to minors" unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. §§ 231(a)(1) and (c)(1) (Supp. IV 1998). COPA imposes

restrictions only in those limited areas wherein the commercial speech affects children. These regulations do not restrict or in any way bar the peddling of sexually explicit materials through lawful transactions to adults. COPA clearly satisfies this Court's "reasonableness" test as set forth in *Fox,* and therefore should be upheld by this Court.

CONCLUSION

The *Amicus Curiae* County of DuPage, Illinois, respectfully requests that this Court rule in favor of Petitioner John Ashcroft, Attorney General of the United States.

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